APPENDIX

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UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

BIA.IA.0943 Mar 20, 1989

Memorandum

To: Field Solicitor, Twin Cities

From: Associate Solicitor, Division of Indian Affairs

Subject: Taxability of Indian-owned fee lands on Indian reservations

In the attached memorandum dated March 22, 1979, the Associate Solicitor, Division of Indian Affairs, directed that your office not pursue claims on behalf of individual Indians who alleged that they had been unlawfully required to pay state taxes on fee lands that they owned within the boundaries of an Indian reservation. Because, for the reasons set out below, I have concluded that the legal conclusion in that prior opinion is in error, I am rescinding that opinion.

That a state may not, absent authorization by Congress, tax tribal members residing on an Indian reservation with respect to on-reservation activity is well-settled law. *Bryan v. Itasca County*, 426 U.S. 373, 376-377 (1976) (*Bryan*); *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463 (1976) (*Moe*); *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973) (*McClanahan*); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973) (*Mescalero*).

Although none of the cited Supreme Court decisions has addressed an attempt by a state to tax Indian-owned land within a reservation, language in some of those decisions

suggests that a state is on weaker ground when it attempts to tax Indian ownership of land than when it imposes any other tax on Indians:

> However relevant the land-income distinction may be in other contexts, it is plainly irrelevant when, as here, the tax is resisted because the State is totally lacking in jurisdiction over both the people and the lands it seeks to tax. In such a situation, the State has no more jurisdiction to reach income generated on reservation lands than to tax the land itself.

McClanahan at 181. *See also Bryan* at 376; *Moe* at 475-476; *Mescalero* at 148.

Our prior opinion, however, concluded that Congress had authorized state taxation of Indian-owned fee lands based on the following language from the General Allotment Act that is codified at 25 U.S.C. § 349:

> At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section 348 of this title, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; . . . Provided, That the Secretary of the Interior may, in his discretion, and he is authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple and thereafter all restrictions as to sale, incumbrance or taxation of said land shall be removed . . .

As our earlier opinion acknowledged, the Supreme Court has made it clear that the first portion of § 349 does not apply as each individual parcel loses its trust status, but only when all the lands have been allotted and the trust expired on all of them. *Moe* at 478-479 quoting *Mattz v. Arnett*, 412 U.S. 481, 496 (1973). Trust allotments con-

tinue to exist on virtually all reservations where allotments were made. As the federal district court pointed out when, in the attached decision in *Confederated Tribes and Bands of the Yakima Indian Nation v. County of Yakima*, No. C-87-654-AAM (E.D. Wash. May 10, 1988), it held that Yakima County may not tax Indian-owned fee land on the Yakima Indian Reservation, the Supreme Court in *Moe* declined to read § 349 as creating checkerboard jurisdiction within a reservation. *Slip op.* at 5-6. The same point is made in the attached letter dated March 14, 1983, from the Oregon Assistant Attorney General, Tax Section, advising that Indian-owned fee property on Indian reservations in the state is exempt from ad valorem taxation.

The March 22, 1979, memorandum from this Division, however, focused on the proviso, which states that whenever a fee patent is issued all restrictions as to taxation are removed, and construed that language as giving permission to states to tax Indian-owned fee land on a reservation. That proviso, however, makes no reference to states, but simply removes any restriction on taxation that had been in place because of the trust status of the land. Although restrictions on taxation are removed when a fee patent is issued for an individual parcel, removing those restrictions does not give a state jurisdiction it does not otherwise have. Once that restriction is removed, such land would have the same status for tax purposes as any other Indian-owned property on the reservation. While such property is probably subject to tribal taxation, *see Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), it may not be taxed by the state. *Bryan*, *supra*; *McClanahan*, *supra*. For that reason it is the tribe—rather than the state—that acquires jurisdiction to tax allotted land when a fee patent is issued to an Indian.

In addition to the federal court decision in *Yakima*, described above, two state courts have addressed the issue of state authority to tax Indian-owned fee property on

an Indian reservation and both concluded that such land is exempt from state taxation. The Supreme Court of Arizona reached that conclusion in *Battese v. Apache County*, 630 P.2d 1027, 129 Ariz. 295 (1981) (*Battese*), with respect to an ad valorem tax and the California Court of Appeals held that the state may not impose its inheritance tax with respect to such lands. *Estate of Johnson*, 178 Cal. Rptr. 823, 125 Cal.3d. 1044, (1st Dist. Cal.App. 1981), *cert. denied*, 459 U.S. 828 (1982). The Idaho State Tax Commission, in the attached opinion dated June 8, 1982, and the Assistant Attorney General, Tax Division, of the Oregon Department of Justice in the opinion discussed above have agreed with the *Battese* decision.

To be sure, it is unlikely that Congress envisioned such a result when it passed the General Allotment Act in 1887. The expectation at that time was that implementation of the allotment policy would soon result in the disappearance of all Indian reservations. *Montana v. United States*, 450 U.S. 544, 559-560 n.9 (1981). That expectation may explain why Congress did not address jurisdictional issues, but it does not determine how such issues will be resolved today. The courts do not extrapolate legislative intent from such expectations, *Solem v. Bartlett*, 465 U.S. 463, 468-469 (1984), nor are they obliged in ambiguous circumstances to implement an assimilationist policy that Congress has since rejected, *Bryan* at 388-389 n.14 (1976).

Accordingly, we recommend that any claims on behalf of individual Indians that you have not pursued because of our March 22, 1979, memorandum be reevaluated in light of the conclusions in this memorandum.

/s/ Dennis Daugherty
DENNIS DAUGHERTY

Attachments

cc: All Regional Solicitors w/attachments

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

Mar 22, 1979

Memorandum

To: Field Solicitor, Twin Cities

From: Associate Solicitor, Division of Indian Affairs

Subject: Taxability of Reservation Lands Owned by Indians in Fee

I am unable to agree with the position taken in the research paper enclosed with your memorandum of January 25, *i.e.*, that Indian-owned fee land within reservations is exempt from state and local real property taxation.

The research paper relies primarily on the principle of federal preemption of state power to tax, correctly stating that this method of analysis is the preferred one where state taxation questions are at issue. However, a fundamental aspect of the principle that Congress may preempt state taxation of Indians is that Congress may also give permission to the states to tax Indians or Indian property. Such permission has been given, with respect to real property taxation of fee lands, in 25 U.S.C. § 349.

In *Moe* v. *Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976), the Supreme Court held that Indians within reservation boundaries are immune from state personal property taxes, vendor license fees, and cigarette sales taxes. In that case, the Court considered the general language in the part of 25 U.S.C. § 349 which provided that, upon the issuance of fee patents, allottees would become subject to *all* civil and criminal laws of the state. It found that this part of § 349 has been modified by or at least requires interpretation in light of later

legislation dealing with jurisdictional matters. This later legislation, the Court said, manifests Congressional intent to eschew checkerboard jurisdiction. Thus, the taxes at issue in *Moe*, which are civil laws of the state and fall within the scope of the first part of § 349, are inapplicable to Indians anywhere within reservation boundaries, regardless of the title status of land.

However, the same conclusion may not automatically be reached with respect to real property taxes, because those taxes are specifically addressed in a later part of § 349. The first proviso to that section provides in part that:

> "[T]he Secretary . . . may . . . cause to be issued to [an] allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of such land shall be removed. . . ."

The Supreme Court did not address this provision in *Moe*. In light of the specific taxing permission contained in the proviso, the Court's holding in *Moe* may not be extended to real property taxes, in the absence, at least, of a showing that the conditions existing with respect to those taxes are the same as those which led the Court to its conclusion in *Moe*, *i.e.*, that subsequent legislation has modified this part of § 349.

I do not believe it can be said that the taxing permission in this proviso has been modified by later legislation. Rather than legislating in a manner inconsistent with it, Congress, since the General Allotment Act, clearly appears to have acted upon the assumption that land owned by Indians in fee is taxable. Subsequent legislation relating to land acquisition or sale, where taxation is mentioned, generally equates tax-exemption with trust or restricted status. *E.g.*, 25 U.S.C. 409a, 412a, 465, 501, 403a-1; Act of July 24, 1956, 70 Stat. 626, § 3.

Section 349 applies, by its terms, to patents in fee issued for allotments. The Act of February 14, 1923, 25 U.S.C.

§ 335, extended the provisions of the General Allotment Act, including 25 U.S.C. § 349, to "all lands heretofore purchased or which may be purchased by authority of Congress for the use and benefit of any individual Indian or band or tribe of Indians." That statute has been construed to encompass lands purchased and taken in trust for individual Indians within the tax-exemption benefits of the General Allotment Act. *Stevens v. Cmnr. of Internal Revenue*, 452 F. 2d 741 (9th Cir. 1971).

Likewise, I think the taxing permission in § 349 must be construed to apply to purchased land, certainly where land is purchased and taken in trust, and for which a patent in fee is later issued. Although it might conceivably be argued that land purchased in fee and not taken into trust does not fall within this permission, I think it is clear that the General Allotment Act and subsequent legislation, taken together, manifest Congressional understanding and intent that tax-exempt status of Indian land depend upon its being trust or restricted land.

Your § 2415 cases which depend upon a theory of nontaxability of fee land should be removed from your case list.

/s/ Thomas W. Fredericks
THOMAS W. FREDERICKS